

**HOUSE OF REPRESENTATIVES STAFF ANALYSIS**

**BILL #:** HB 861                      Homeowners Associations  
**SPONSOR(S):** Bilirakis  
**TIED BILLS:** none                      **IDEN./SIM. BILLS:** SB 1410

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REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Judiciary</u>	<u>17 Y, 0 N w/CS</u>	<u>Jaroslav</u>	<u>Havlicak</u>
2) <u>Business Regulation</u>	_____	_____	_____
3) _____	_____	_____	_____
4) _____	_____	_____	_____
5) _____	_____	_____	_____

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**SUMMARY ANALYSIS**

Current law provides that a homeowners’ association may file a recorded notice to prevent extinguishment of a covenant or restriction by marketable record title if the notice is approved by a majority vote of the association’s members. This bill provides that such notice must instead be approved by a two-thirds vote of its board of directors. This bill also allows for some content requirements of the statutory notice for preservation against marketable record title to be satisfied by a homeowners’ association filing an affidavit affirming that it delivered a statement to each of the associations’ members informing them of a “marketable record title action” by the association. Additionally, this bill deems recorded covenants or restrictions to be sufficiently described if the notice to preserve against marketable title refers to the book and page where the covenants or restrictions were recorded.

This bill also makes several changes to ch. 720, F.S., the law governing homeowners’ associations. These include:

- providing a non-exclusive list of “matters of common interest” to members of a homeowners’ associations, upon which the association may “institute, maintain, settle, or appeal actions or hearing in its name on behalf of all members”;
- specifically authorizing homeowners’ associations to defend eminent domain and inverse condemnation actions;
- specifically authorizing homeowners’ associations to be named as representatives of a class in class action litigation; and
- narrowing the category of rights of a member of a homeowners’ association that are protected from later amendments to the association’s governing documents, or from changes in the law.

This bill does not appear to have a fiscal impact on state or local governments.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. DOES THE BILL:

- |                                      |                              |  |   |
|--------------------------------------|------------------------------|--|---|
| 1. Reduce government?                | Yes <input type="checkbox"/> | No <input type="checkbox"/>            | N/A <input checked="" type="checkbox"/> |
| 2. Lower taxes?                      | Yes <input type="checkbox"/> | No <input type="checkbox"/>            | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom?        | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/>            |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/> | No <input type="checkbox"/>            | N/A <input checked="" type="checkbox"/> |
| 5. Empower families?                 | Yes <input type="checkbox"/> | No <input type="checkbox"/>            | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

This bill transfers authority to file a notice preserving claims against marketable record title from the members of a homeowners' association to the associations' board of directors.

This bill may also allow for members of homeowners' associations having their proportionate voting interests reduced, or their share of the association's common expenses increased, by some future changes in general law, whether intentionally or incidentally.

#### B. EFFECT OF PROPOSED CHANGES:

##### **Present Situation: Marketable Record Title**

Under s. 712.02, F.S., an owner of real property who, alone or with predecessors in title, has held any estate in land of record for 30 years or more is said to have "marketable record title" to that estate. This title is free and clear of all claims other than the following exceptions to marketability expressly included in s. 712.03, F.S.:

(1) Estates or interests, easements and use restrictions disclosed by and defects inherent in the muniments of title on which said estate is based beginning with the root of title; provided, however, that a general reference in any of such muniments to easements, use restrictions or other interests created prior to the root of title shall not be sufficient to preserve them unless specific identification by reference to book and page of record or by name of recorded plat be made therein to a recorded title transaction which imposed, transferred or continued such easement, use restrictions or other interests; subject, however, to the provisions of subsection (5).

(2) Estates, interests, claims, or charges, or any covenant or restriction, preserved by the filing of a proper notice in accordance with the provisions hereof.

(3) Rights of any person in possession of the lands, so long as such person is in such possession.

(4) Estates, interests, claims, or charges arising out of a title transaction which has been recorded subsequent to the effective date of the root of title.

(5) Recorded or unrecorded easements or rights, interest or servitude in the nature of easements, rights-of-way and terminal facilities, including those of a public utility or of a governmental agency, so long as the same are used and the use of any part thereof shall except from the operation hereof the right to the entire use thereof. No notice need be filed in order to preserve the lien of any mortgage or deed of trust or any supplement thereto encumbering any such recorded or unrecorded easements, or rights, interest, or servitude in the nature of easements, rights-of-way, and terminal facilities. However, nothing herein shall be

construed as preserving to the mortgagee or grantee of any such mortgage or deed of trust or any supplement thereto any greater rights than the rights of the mortgagor or grantor.

(6) Rights of any person in whose name the land is assessed on the county tax rolls for such period of time as the land is so assessed and which rights are preserved for a period of 3 years after the land is last assessed in such person's name.

(7) State title to lands beneath navigable waters acquired by virtue of sovereignty.

(8) A restriction or covenant recorded pursuant to chapter 376 [land reclamation] or chapter 403 [environmental control].

All other "estates, interests, claims, or charges" are extinguished by marketable record title,<sup>1</sup> except if a person claiming such an interest files for record a notice within the 30-year statutory period,<sup>2</sup> the contents of which are specified in s. 712.06(1), F.S.<sup>3</sup> A homeowners' association may file such a notice only if approved by a majority vote at a meeting of its membership where a quorum is present.<sup>4</sup>

### **Present Situation: Homeowners' Associations**

A homeowners' association is "a Florida corporation responsible for the operation of a community ... in which the voting membership is made up of parcel owners or their agents, or a combination thereof."<sup>5</sup> A community is defined as all real property that is or will be subject to a recorded declaration of covenants;<sup>6</sup> a declaration of covenants is, in turn, a "written instrument ... which subjects the land comprising the community to the jurisdiction and control of an association ... in which the owners of the parcels, or their association representatives, must be members."<sup>7</sup> Corporations, whether for profit or not for profit, generally have authority to hold property and to sue and be sued in their own name, as well as other powers.<sup>8</sup> However, Florida law does not specifically state whether homeowners' associations, or corporations in general, may be representatives of a class in a class action suit.

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<sup>1</sup> Section 712.04, F.S.

<sup>2</sup> See s. 712.05, F.S.

<sup>3</sup> Section 712.06(1), F.S., provides:

To be effective, the notice above referred to shall contain:

- (a) The name or description of the claimant or the homeowners' association desiring to preserve any covenant or restriction and the name and particular post office address of the person filing the claim or the homeowners' association.
- (b) The name and post office address of an owner, or the name and post office address of the person in whose name said property is assessed on the last completed tax assessment roll of the county at the time of filing, who, for the purpose of such notice, shall be deemed to be an owner.
- (c) A full and complete description of all land affected by such notice, which description shall be set forth in particular terms and not by general reference, but if said claim is founded upon a recorded instrument or a covenant or a restriction, then the description in such notice may be the same as that contained in such recorded instrument or covenant or restriction, provided the same shall be sufficient to identify the property.
- (d) A statement of the claim showing the nature, description, and extent of such claim or, in the case of a covenant or restriction, a copy of the covenant or restriction, except that it shall not be necessary to show the amount of any claim for money or the terms of payment.
- (e) If such claim is based upon an instrument of record or a recorded covenant or restriction, such instrument shall be sufficiently described to identify the same, including reference to the book and page in which the same is recorded.
- (f) Such notice shall be acknowledged in the same manner as deeds are acknowledged for record.

<sup>4</sup> See s. 712.05, F.S.

<sup>5</sup> Section 720.301(7), F.S.

<sup>6</sup> See s. 720.301(3), F.S.

<sup>7</sup> Section 720.301(4), F.S.

<sup>8</sup> See ss. 607.0302 (for-profit corporations) and 617.0302 (non-profit corporations), F.S.

Section 720.301(6), F.S., defines the “[g]overning documents” of a community subject to a homeowners’ association as:

- (a) The recorded declaration of covenants for a community, and all duly adopted and recorded amendments, supplements, and recorded exhibits thereto; and
- (b) The articles of incorporation and bylaws of the homeowners’ association, and any duly adopted amendments thereto.

Section 720.306, F.S., governs meetings of the members of a homeowners association. In general, s. 720.306(1)(b), F.S., provides that governing documents of a homeowners’ association may be amended by a vote of two-thirds of the total voting interests in the association, unless otherwise forbidden by law or by the governing documents themselves. However, s. 720.306(1)(c), F.S., also specifies that:

Unless otherwise provided in the governing documents as originally recorded, an amendment may not affect vested rights unless the record owner of the affected parcel and all record owners of liens on the affected parcels join in the execution of the amendment.

A “vested right” is either an immediate right of present enjoyment or a present, fixed, future right of enjoyment.<sup>9</sup> It is a property interest that may not be taken without due process of law.<sup>10</sup> To be considered “vested,” a right must have become a title, either legal or equitable, to the present or future enforcement of a demand.<sup>11</sup>

### **Proposed Changes**

This bill amends s. 712.05, F.S., to provide that for a homeowners’ association to approve filing of a notice to preserve claims against extinguishment by marketable record title, the association must do so by a two-thirds vote of its board of directors.

This bill also amends s. 712.06(1)(b), F.S., to allow the requirements of that paragraph of the statutory notice for preservation against marketable record title to be satisfied by a homeowners’ association filing an affidavit affirming that it delivered a statement, the language of which is provided in the bill, to each of its members. This statement informs the members of a “marketable record title action” by the homeowners’ association. This bill further amends s. 712.06(1)(e), to deem recorded covenants or restrictions to be sufficiently described if this notice of marketable title action refers to the book and page where the covenants or restrictions were recorded.

Additionally, this bill amends s. 720.303, F.S., to do the following:

- provide a non-exclusive list of “matters of common interest” to members of a homeowners’ associations, upon which the association may “institute, maintain, settle, or appeal actions or hearing in its name on behalf of all members”;
- specifically authorize homeowners’ associations to defend eminent domain and inverse condemnation actions;
- specifically authorize homeowners’ associations to be named as representatives of a class in class action litigation; and

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<sup>9</sup> See *Sanford v. McClelland*, 163 So. 513 (Fla. 1935); *Division of Workers’ Compensation v. Brevda*, 420 So.2d 887 (Fla. 1st DCA 1982). See generally 10 FLA. JUR. 2D CONSTITUTIONAL LAW §§ 331-338.

<sup>10</sup> See *Mahood v. Bessemer Properties, Inc.*, 18 So.2d 775 (Fla. 1944).

<sup>11</sup> See *In re Will of Martell*, 457 So.2d 1064 (Fla. 2d DCA 1984).

- make clear that these provisions do not limit the preexisting rights of individual members of a homeowners' association.

Finally, this bill amends s. 720.306(1)(c), F.S., to considerably narrow the scope of rights of a member of a homeowners' association that that subsection protects from later amendments to the association's governing documents. This bill does this by: 1) changing the language of the subsection's protection from all "vested rights" to cover only the proportionate voting interests or share of common expenses appertaining to a parcel, and 2) allowing such amendments not only if provided for in the governing documents themselves, but also if permitted by chs. 617 or 720, F.S. (the non-profit corporation and homeowners' association chapters, respectively).

#### C. SECTION DIRECTORY:

Section 1. Amends s. 712.05, F.S., to provide that for a homeowners' association to approve filing of a notice to preserve claims against extinguishment by marketable record title, the association must do so by a two-thirds vote of its board of directors.

Section 2. Amends s. 712.06, F.S., to allow some requirements of the notice for preservation against marketable record title to be satisfied by a homeowners' association filing an affidavit affirming that it delivered a statement to each of the associations' members informing them of a "marketable record title action" by the association; and to deem recorded covenants or restrictions to be sufficiently described if this notice of marketable title action refers to the book and page where the covenants or restrictions were recorded.

Section 3. Amends s. 720.303, F.S., to clarify the powers of homeowners' associations.

Section 4. Amends s. 720.306(1)(c), F.S., to narrow the categories of rights of a member of a homeowners' association that are protected from amendment of the associations' governing documents.

Section 5. Provides an effective date of July 1, 2003.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

##### 1. Revenues:

None.

##### 2. Expenditures:

None.

#### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

##### 1. Revenues:

None.

##### 2. Expenditures:

None.

#### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, does not appear to reduce the authority that counties or municipalities have to raise revenue in the aggregate, and does not appear to reduce the percentage of state tax shared with counties or municipalities.

2. Other:

**Single-Subject Requirement**

Article III, s. 6 of the Florida Constitution provides that “[e]very law shall embrace but one subject and matter properly connected therewith.” It is possible that a court might find that this bill violates that provision.

In *State v. Thompson*<sup>12</sup> and *Heggs v. State*,<sup>13</sup> the Florida Supreme Court found that a bill containing both a criminal penalty and a civil cause of action violated the single-subject requirement. The Court has ruled that provisions of a bill must have a “natural and logical connection” in order to survive single-subject scrutiny.<sup>14</sup> A court might possibly find that, because this bill’s provisions affect homeowners’ associations, they have such a connection. Conversely, however, a court could also find that, because this bill’s provisions include changes to the marketable record title statutes that affect persons other than homeowners’ association or their members, it lacks such a connection and thus violates the single-subject requirement. In that case, the likely remedy would be for the court to strike down the entire bill.

**Impairment of Contracts**

Both article I., s. 10 of the United States Constitution and article I, s. 10 of the Florida Constitution forbid state impairment “of the obligation of contracts.”<sup>15</sup> Florida courts have generally treated the requirements of the state and federal Contract Clauses as identical, although they have suggested that the provision in the state constitution is probably stronger.<sup>16</sup>

Documents creating some private legal entities have been treated as contracts under the Contracts Clause since at least 1819. That year, in *Trustees of Dartmouth College v. Woodward*,<sup>17</sup> the Supreme Court of the United States ruled that, by attempting to transform Dartmouth College into a public university, New Hampshire had unconstitutionally impaired the obligations of contract—

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<sup>12</sup> 750 So.2d 643 (Fla. 1999).

<sup>13</sup> 759 So. 2d 620 (Fla. 2000).

<sup>14</sup> *Chenoweth v. Kemp*, 396 So.2d 1122, 1124 (Fla. 1981) (quoting *Board of Public Instruction v. Doran*, 224 So.2d 693, 699 (Fla. 1969)).

<sup>15</sup> See generally 16 AM. JUR. 2D CONSTITUTIONAL LAW §§ 708-744; 10 FLA. JUR. 2D CONSTITUTIONAL LAW §§ 348-373.

<sup>16</sup> See, e.g., *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So.2d 774 (Fla. 1980) (accepting as persuasive an interpretation of the federal Contract Clause by the Supreme Court of the United States in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978)).

<sup>17</sup> 17 U.S. (4 Wheat.) 518 (1819).

obligations the state had inherited as successor-in-interest to the British Crown, which granted Dartmouth's corporate charter in 1769.

Under longstanding case law in this state, a corporate charter or articles of incorporation becomes a contract between the shareholders of the corporation and the state upon being granted—a contract governed by the law in force at the time it was made.<sup>18</sup> However, courts have also ruled that the Legislature's express reservation, in s. 607.0102, F.S., of its power to amend or repeal the Florida Business Corporations Act, prevents a corporation from asserting unalterable contractual rights in its charter or articles of incorporation.<sup>19</sup> Because ch. 720, F.S., does not contain such a reservation, it is possible that amending this chapter with respect to vested rights may only be prospective in nature, i.e., such amendments might only apply against homeowners' associations or their members that acquired such rights after the amendments became effective.

**B. RULE-MAKING AUTHORITY:**

None.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

Section 3 of this bill, amending s. 720.303(1), F.S., makes several different substantive changes. For the sake of clarity, it might make sense to break the entire statutory subsection (both new and old language) into paragraphs.

#### **IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES**

On March 18, 2003, the House Committee on Judiciary adopted two amendments to this bill. The first amendment:

- amends s. 712.05, F.S., to provide that for a homeowners' association to approve filing of a notice to preserve claims against extinguishment by marketable record title, the association must do so by a two-thirds vote of its board of directors;
- amends s. 712.06(1)(b), F.S., to allow the requirements of that paragraph of the statutory notice for preservation against marketable record title to be satisfied by a homeowners' association filing an affidavit affirming that it delivered a statement to each of the associations' members informing them of a "marketable record title action" by the association; and
- amends s. 712.06(1)(e), to deem recorded covenants or restrictions to be sufficient described if this notice of marketable title action refers to the book and page where the covenants or restrictions were recorded.

The second amendment corrects a typographical error.

The Committee then reported this bill favorably with a committee substitute.

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<sup>18</sup> See *Marion Mortgage Co. v. State ex rel. Davis*, 145 So. 222 (Fla. 1932); *Ex parte Amos*, 114 So. 760 (Fla. 1927); *Columbia County Comm'rs v. King*, 13 Fla. 451 (1869).

<sup>19</sup> See *Aztec Motel, Inc. v. State*, 251 So.2d 849 (Fla. 1971); *Hopkins v. The Vizcayans*, 582 So.2d 689 (Fla. 3d DCA 1991).